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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO AMEND RULE 17.1(f)(1))	No. R-20-0005
AND RULE 41, FORM 28, ARIZONA)	
RULES OF CRIMINAL PROCEDURE)	REPLY
)	
_____)	

This petition requested the Court to amend Rule 17.1(f)(1) of the Arizona Rules of Criminal Procedure, a rule that allows telephonic pleas in limited jurisdiction courts, and to adopt a modified form, Rule 41, Form 28, which is used for the entry of telephonic pleas. For the reasons stated in this Section (1) of this Reply, Petitioner now requests further and substantial modifications to the proposed rule and form.

(1) Summary of the Comments. Two comments to the petition were filed on the Rules Forum. One comment was filed by the Arizona Attorneys for Criminal Justice (“AACJ”), and your Petitioner undersigned filed the other. Both comments were filed on May 1, 2020, several weeks into the COVID-19 pandemic. AACJ’s

comment observed, “The current circumstances and future uncertainty caused by the COVID-19 pandemic make such expanded availability [of telephonic pleas] even more prudent.” Petitioner’s own comment noted that “due to the concern for the spread of COVID-19 in the general population, courts must conduct court business in a manner that reduces the risk associated with this public emergency, which includes expanding the use of technology to eliminate or limit in-person contact.” Thus, COVID-19 underscored the need for expanded use of telephonic pleas in limited jurisdiction courts.

AACJ’s comment further noted that current Rule 17.1(f)(1)(A) limits the eligibility for telephonic pleas in limited-jurisdiction courts to defendants who reside out-of-state or more than 100 miles from the court, or who have a serious medical condition that makes appearing in court an undue hardship. The amendments to this rule initially proposed by the Petitioner contained these same limitations. AACJ recommended that “the Court should take this opportunity to expand the eligibility of telephonic pleas in limited-jurisdiction courts beyond these two categories of defendants.” Because the COVID-19 pandemic will likely continue for the foreseeable future, Petitioner agrees with the AACJ’s recommendation.

(2) Proposed Changes. Here is an explanation of the most significant, recent revisions to Rule 17.1(f).

First, a definition of “telephonic” was added in the introductory language of section (f). “Telephonic” includes “voice only communications between the court and the parties, and an application that permits video in addition to voice communications.” Along with traditional telephonic communications, this definition would permit, for example, the use of Zoom, Skype, FaceTime, or similar internet-based applications, which are now widely utilized by courts and others. The introductory language to section (f) also provides that these provisions apply to pleas submitted through an online dispute resolution system (“ODR”), which the Court authorized in 2019 through a pilot program in an Arizona municipal court. (See Administrative Order No. 2019-04.)

Second, Rule 17.1(f)(1)(A) (titled “discretionary”) clarifies that a limited jurisdiction court has discretion to accept a telephonic plea in any misdemeanor case. There are multiple factors that could influence the court’s discretion, including the nature of the charge, the defendant’s criminal history, the volume of cases on the court’s calendar, and the court’s logistical capabilities. Additionally, and driven largely by the COVID-19 pandemic, the provision no longer requires that the defendant reside in another state, at least 100 miles from the courthouse, or have a serious medical condition to be eligible to enter a telephonic plea. Under the proposed amendments, a defendant in perfect health who lives across the street from the courthouse could, if the court allows, enter a telephonic plea. This change also

aligns the rule with the structure of the ODR pilot, which has no geographic or medical pre-conditions.¹

Third, the proposed procedure in revised Rule 17.1(f)(1)(B) would require that the defendant include with Form 28 a legible photocopy of the defendant's driver's license or another, government-issued photo identification. The current rule requires a law enforcement officer to add the defendant's fingerprint to Form 28 in every case in which the defendant enters a telephonic plea. However, the list of offenses in A.R.S. § 13-607(A), which contains the fingerprint requirement, does not include every misdemeanor, so in a significant number of cases, a fingerprint won't be necessary, and Form 28 should not require a fingerprint in those cases. Petitioner considered substituting a requirement for a notary seal in lieu of a fingerprint in those other cases, but a photocopy of a picture identification is self-authenticating and could be even more useful than a fingerprint for establishing the defendant's identity.

Fourth, section (C) ("fingerprint") continues to acknowledge the fingerprint requirement of A.R.S. § 13-607 in certain cases. The revised rule and form therefore

¹ Supreme Court Administrative Order No. 2020-75, entered on May 8, 2020, at page 4 provides, "The 100-mile distance requirement for a limited jurisdiction court to accept a telephonic plea under Rule 17.1 (f) of the Rules of Criminal Procedure is suspended through December 31, 2020." On May 20, 2020, the Court replaced A.O. No. 2020-75 with A.O. No. 2020-79, but the foregoing provision was retained in the new order.

retain the statutory requirement of a fingerprint for telephonic pleas to offenses referenced in this statute. However, the amended language eliminates a current requirement that the Arizona law enforcement officer who obtains the print must be in the county where the defendant resides, thereby enabling any Arizona law enforcement officer to affix an Arizona defendant's fingerprint to the form.

If the plea form omits a required fingerprint, the proposed amendments provide that the court may defer acceptance of the plea until the print is submitted, or the defendant may appear in open court for sentencing and provide the print at that time. The proposed amendment goes a step further by recognizing that obtaining a fingerprint might not always be practical, or that a fingerprint might not be the best method of proving a prior conviction.² Accordingly, the proposed rule also provides, "Instead of requiring a certification and fingerprint, the court may permit another method of proving the defendant's identification on Form 28, including but not limited to allowing the defendant to use a notary public to witness the defendant's signature on the form."

Fifth, under section (D), the court must hold an in-person or telephonic hearing before accepting the plea. Thus, the court will still have personal interaction

² Administrative Order No. 2020-79, referenced in footnote 1, further provides at page 5, "When conducting virtual hearings, courts may establish procedures to collect the defendant's fingerprint, or to otherwise establish the defendants [sic] identity as an alternative means of complying with the procedures required by A.R.S. § 13-607 and Rule 26.10 of the Rules of Criminal Procedure."

with the defendant, even if the dialogue is by telephone only. Sentencing can follow the court's acceptance of the plea, or sentencing can be set for a future hearing.

Two versions of Rule 17.1(f)(1) are included in the Appendix. The first version shows the changes proposed by this Reply without any markup (a "clean" version). The other version compares the clean version with what had been initially proposed by this rule petition.

Revised Form 28 conforms to the proposed revisions to Rule 17.1(f) described above. Because the modifications to current Form 28 proposed by this Reply are extensive, Petitioner is not submitting a redline version that shows the proposed changes. Rather, Petitioner asks the Court to abrogate current Form 28 and to adopt the version shown in the Appendix.

The revised form includes other proposed revisions such as the following. Item 6 of the current form recites, "I understand the range of penalties to be..." However, the current form recites the maximum penalties rather than the range. The words "range of" were accordingly changed to "maximum." Some offenses have mandatory minimum penalties or other special conditions that are imposed at sentencing. Therefore, Form 28 would include a new item 7 that says, "I understand there are special conditions, including required minimum penalties, for the charge or charges to which I am pleading guilty or no contest, as follows...." The officer's certification on the form includes references to the titles of specified offenses, and

not merely the statute numbers. The revised form includes space for a notary if a notary is utilized in lieu of an officer's certification. Also, the last page of Form 28 was revised to accommodate sentencing on multiple charges, thereby aligning the sentencing section of Form 28 with the corresponding portion of Form 28(a), which is used for pleas by mail.

(3) Committee on Limited Jurisdiction Courts ("LJC"). The significant changes proposed by this Reply were verbally presented to the LJC on May 20, 2020. One LJC member asked whether the photo identification attached to Form 28 should also include the defendant's signature, but other members thought that the photograph itself was the best authentication of the defendant's identity and that the identification card need not include a signature, so the draft rule was not changed to require one. Another member observed that some law enforcement agencies are declining to provide fingerprints on Form 28 because of COVID-19. This makes alternatives—one of which is proving a defendant's identity by having a notary public witness the defendant's signature on Form 28—even more compelling.

LJC members seemed receptive to the elimination of the distance requirement in the current rule and other proposed amendments. However, because the proposed amendments, which were still undergoing revision at the time of the LJC meeting, were not provided in document form to the Committee, the LJC took no formal action.

(4) Conclusion. For the reasons above, Petitioner requests the Court to amend Rule 17.1(f)(1) as shown in the Appendix to this Reply, to abrogate current Form 28, and to adopt the new Form 28 in the Appendix.

RESPECTFULLY SUBMITTED this 27th day of May 2020.

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Appendix

The Appendix to this Reply consists of the following three documents, which are separately filed on the Rules Forum:

- Revised Rule 17.1 (the clean version)
- A comparison of the above revised Rule 17.1 with the draft of Rule 17.1 that was appended to the January 2020 filing of this rule petition
- Revised Form 28